

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

PLI *Gilman* *640 00045*
[Protest of Army Contract Award] 15473

FILE: B-198670

DATE: November 18, 1980

MATTER OF: Solon Automated Services, Inc.

DIGEST:

DLG05520

1. Large business protester is interested party under GAO's Bid Protest Procedures to challenge award under total small business set-aside where issue raised relates to whether awardee meets eligibility criterion used to disqualify protester.
2. GAO cannot question procuring agency's position that it would not be in Government's best interest to terminate for convenience small business set-aside contract awarded to large business concern.

Solon Automated Services, Inc. (Solon), protests the award of a contract to Macke Laundry Service Company (Macke-Laundry) under request for proposal (RFP) No. DAAD05-80-R-0026 issued by the Department of the Army (Army), Aberdeen Proving Ground, Maryland. *DLG05521* *AGC00299*

(The RFP was a total small business set-aside for the rental of automatic washers and dryers, including installation and maintenance.) The machines were to be installed in 71 billeting locations for the use of the enlisted personnel assigned to those quarters. Solon argues that the contract should not have been awarded to Macke-Laundry because the company is admittedly owned by, and affiliated with, The Macke Company, a large business under the relevant size standard. The Army, however, argues that Solon, a large business, is not an interested party under our Bid Protest Procedures, 4 C.F.R. Part 20 (1980). (In the alternative, the Army argues that Solon's protest should be denied because Macke-Laundry's certification that it was a small business, although incorrect, was made in good faith and that the present stage of performance now makes it impractical for the contract to be terminated and the requirement resolicited.)

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Based on our review, we sustain the protest.

Background

The solicitation was issued on February 29, 1980, providing for a base contract period of May 1, 1980, through April 30, 1981, with two 1-year options. Six offers were received by the date set for the receipt of initial proposals on March 14, 1980. Among these was an offer from Solon and one from Macke-Laundry. Solon's offer, however, clearly indicated that Solon was a large business. (According to Solon, the purpose of its offer was to inform the Army of the "price at which the equipment and services could be procured so that an evaluation could be made as to whether the small business set-aside price offers were reasonable.") Macke-Laundry, however, certified in its offer that it was a small business. When the contracting officer requested best and final offers, he requested a best and final offer from Macke-Laundry but not from Solon since, as a large business, Solon was not eligible for the award. (Macke-Laundry was determined to be the low, responsible offeror, and because the incumbent contractor was in default, the contracting officer determined that an immediate award was necessary to maintain continuity of service. Therefore, the contracting officer, as noted below, determined not to give the preaward notice of the apparently successful offeror otherwise required in a negotiated, small business set-aside procurement. Therefore, Macke-Laundry was awarded the contract on April 8, 1980, and on that same day, notification of the award was sent to all unsuccessful offerors, including Solon.

On April 14, 1980, the Army received a protest from Solon challenging Macke-Laundry's small business status. This size protest was then referred to the Small Business Administration (SBA). But before SBA considered the matter, Macke-Laundry notified the Army by letter dated April 17, 1980, that it had erroneously represented itself as a small business. Macke-Laundry termed this error inadvertent. Later, on May 9, 1980, SBA concluded that Solon had submitted a "timely protest" and that Macke-Laundry was not a small business because of the affiliation involved. Nevertheless, the Army decided that Macke-Laundry had acted in good faith when it certified itself as small because it had relied on certain information, discussed below, from an Army

employee. In light of this, the Army has allowed the award to stand, although it has informed us that it will not exercise the options involved.)

(The threshold question is whether Solon is an interested party under our Bid Protest Procedures so that it can maintain this protest.) See 4 C.F.R. § 20.1(a) (1980). The Army argues that Solon is not an interested party because as a large business it is not eligible for an award under a total small business set-aside.

(The general rule is that a protesting party must have some legitimate interest in the procurement before our Office will consider the protest. In determining whether a protester satisfies the interested party criterion, consideration must be given to a variety of factors, such as the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. This serves to insure the protester's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the propriety of the procurement can be judged. See Space Services, B-195493, October 22, 1979, 79-2 CPD 276.

Solon was declared ineligible because, unlike Macke-Laundry, it accurately certified in its proposal that it was a large business. (We have previously held that a large business is an interested party to the extent the large business contests whether the apparent low offer meets the small business eligibility criterion used to disqualify the protester.) See, e.g., Coleman Transfer and Storage, Inc., B-182420, October 17, 1975, 75-2 CPD 238. Of course, where the large business raises an issue which is unrelated to the eligibility criterion, the protester is not an interested party as to that issue. See, for example, Do All Iowa Company, B-187200, September 23, 1976, 76-2 CPD 276, where we held that a large business could not be an interested party as to the competency of a small concern to perform a set-aside contract. Thus, (Solon is an interested party for the purpose of this protest.)

Validity of Award

(A) Urgency Determination

(Solon first argues that the set-aside contract is invalid because the contracting officer lacked authority to make the award) to Macke-Laundry apart from

the question of Macke-Laundry's size certification. Specifically, Solon insists that the Army improperly invoked the authority set forth in Defense Acquisition Regulation (DAR) § 3-508.2(b) (July 1976). That regulation provides, in effect, (that a contracting officer need not release the identity of the apparently successful set-aside awardee in a negotiated procurement--so as to enable the possibility of a meaningful pre-award size protest--in any "urgent procurement" which "must be awarded without delay to protect the public interest.")

The contracting officer's determination to proceed with an award under the authority of this provision reads:

"In accordance with DAR 3-508.2, it is the determination of the contracting officer that it is necessary to make award of this contract as soon as possible to keep the troops supplied with washers and dryers as the contractor holding the current contract (DAAD05-77-C-0020) is facing possible default action.

"Therefore, in order to give the low offeror adequate time to purchase and install the washers and dryers, it is necessary to award this contract promptly without:

"a. Giving notice to Solon Automated Services, in accordance with DAR 3-508.2(a), that their proposal is unacceptable because he acknowledged being a large business.

"b. Giving pre-award notice to the apparently unsuccessful offerors in accordance with DAR 3-508.2(b)."

Solon notes that the "commencement date" (May 1, 1980) of the contract was nearly 3 weeks after the award date (April 8, 1980); consequently, the company argues that giving a preaward notice of an intent to award to Macke-Laundry would not have interfered with the commencement date of the contract. Moreover, Solon insists that a "few days slippage" in the commencement date would not have affected contract performance.

(Even though the award date was 3 weeks before the commencement date of the contract, we do not view this fact as affecting the contracting officer's "urgency" determination because of the leadtime necessary to obtain and install the quantities of washers and dryers involved here. Further, we are not in a position to question the contracting officer's apparent position that even a few days' slippage in supplying the washers and dryers could not be tolerated. Thus, we cannot question the validity of the award under the cited DAR provision.)

(B) Size Certification

Solon also believes that Macke-Laundry misrepresented its size status and that as a result, its contract should be considered void. On this point, Solon cites Capital Fur, Inc., B-187810, April 6, 1977, 77-1 CPD 237, where we said it is "conceivable that [a small business set-aside award] could be considered void if there is a clear showing of [a fraudulent or bad faith size representation]." See, also, Techalloy Company, Inc., B-187856, March 15, 1977, 77-1 CPD 192. By use of the word "void," we actually mean voidable at the Government's option. See 49 Comp. Gen. 369, 375 (1969). (Nevertheless, we do not consider it necessary to determine whether the contract is voidable since the Army clearly induced Macke-Laundry to continue with performance of the contract and to incur costs after Macke-Laundry informed the Army on April 17 that it was not small.)

In any event, even if a concern has certified its size in good faith and been awarded a set-aside contract, termination for convenience of the contract should be considered if, pursuant to a timely size protest, the contractor is found to be a large business. R.E. Brown, Co., Inc., B-193672, August 29, 1979, 79-2 CPD 164.

Conclusion

The Army has informed us that ("Macke-Laundry has incurred the majority of the costs of performance of this contract and that termination for the convenience of the Government would not be in the Government's best interest.")

(We cannot question the Army's position that termination for convenience would be contrary to the Government's best interest given the status of the contract; moreover, as noted above, the Army has informed us that it will not exercise the options in the contract.)

Henry K. Van Cleave

For the Comptroller General
of the United States